IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

GOVERNMENT'S RESPONSE TO DEFENDANT TONAWANDA COKE'S SENTENCING MEMORANDUM

THE UNITED STATES OF AMERICA, by and through its attorney, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Robert G. Dreher, Acting Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Senior Trial Attorney, respectfully files this response to the sentencing memorandum (hereinafter "Memorandum") filed by Defendant Tonawanda Coke Corporation ("Tonawanda Coke") (Dkt. #229).

I. Tonawanda Coke Misstates its Relationship With the Regulatory Agencies

Throughout its Memorandum, Tonawanda Coke falsely portrays itself as having an exemplary working relationship with the New York State Department of Environmental Conservation (NYS-DEC) and the United States Environmental Protection Agency (EPA). Tonawanda Coke then uses this false premise as a basis to argue that (i) a non-substantial penalty is warranted because the regulatory agencies were aware of the environmental

criminal offenses; (ii) Tonawanda Coke independently and on its own upgraded certain equipment at the plant; and (iii) an investigation into possible contamination of the coal field is not warranted. Following convictions on 14 serious environmental crimes, it is disingenuous for Tonawanda Coke to now claim that it had a "prior positive working relationship with the NYS-DEC inspectors and [a] commitment to compliance," *see* Dkt. #229, p. 14., when the facts from this case, as demonstrated at trial and as contained in the past regulatory history, illustrate a company that flaunted the authority of the regulatory agencies. Since 1979, Tonawanda Coke has sought practically every regulatory exemption possible with the sole purpose of maximizing profits.

On November 17, 1979, J.D. Crane wrote to the NYS-DEC in an attempt to explain why Part 214 of Title 6 of the New York Codes, Rules and Regulations, as applied to Tonawanda Coke, was "discriminatory and unreasonable." Attached hereto as **Exhibit 1** is a copy of the November 17, 1979 letter. In the letter, Mr. Crane uses pushing controls as an example of the unreasonable burden Part 214 imposes in foundry coke batteries, and notes that "pushing emission controls are extremely expensive to install and extremely expensive to maintain and operate." On December 19, 1979, Tonawanda Coke filed a formal suit in Albany County Supreme Court challenging Part 214 and seeking a declaratory judgment that such part is invalid and should not be applied to Tonawanda Coke. A copy of the petition filed by Tonawanda Coke against the NYS-DEC is attached hereto as **Exhibit 2**. On April 23, 1980, NYS-DEC informed Tonawanda Coke that it would consider an application for an exemption from Part 214 if a formal application was made, and directed that such an application be made on an expedited basis. Attached hereto as **Exhibit 3** is a

copy of NYS-DEC's letter dated April 23, 1980. After almost a year's time, Tonawanda Coke had failed to submit such a formal application, which prompted a letter from NYS-DEC dated February 6, 1981. In the letter, NYS-DEC notes that Tonawanda Coke's failure to submit an application was "contrary to the spirit of cooperation" and that Tonawanda Coke has "chosen not to communicate … on this issue." Attached hereto as **Exhibit 4** is a copy of NYS-DEC's letter dated February 6, 1981.

Ultimately, NYS-DEC granted Tonawanda Coke an exemption from pushing emission controls in return for more stringent control requirements on other components of the battery, including more restrictive leak limits from the oven doors, lids, and off take piping as well as lower charging visible emission limits. Subsequent regulations required a Method 303 inspection process, which utilized daily third-party inspectors to measure leaks on the coke oven battery. However, as the Court heard during trial, Tonawanda Coke's compliance with those more stringent conditions was masked by employees who routinely lowered the back pressure on the coke oven battery prior to 303 inspections and failed to report such adjustments to the 303 inspector.

Another example of Tonawanda Coke's defiant attitude toward the regulatory agencies is apparent in correspondence from 1984 with the Erie County Department of Environmental Planning. On June 27, 1984, Erie County wrote to Tonawanda Coke regarding dust issues arising from the coal storage area of the plant and observations made during onsite inspections. Attached hereto as **Exhibit 5** is a copy of the letter sent by Erie County. Importantly, the letter noted:

> Prior to my leaving your firm's property, I discussed the problem with Mr. Kamholtz (sic) and requested that voluntary steps be undertaken to control windborne dust. Mr. Kamholtz (sic) said that there were no problems at the time and no commitment would be made until a problem has been documented.

Erie County's letter requested a written reply by July 10, 1984. On August 16, 1984, J.D. Crane sent a response to Erie County's letter dismissing Tonawanda Coke's contribution to any particulate fallout in the community. Attached as **Exhibit 6** is a copy of J.D. Crane's response.

Two other examples of Tonawanda Coke's direct contravention of regulatory directives were discussed in the government's Sentencing Memorandum, which included the operation of Quench Tower #2 without baffles and the operation of the battery flare stack without an automatic igniter. *See* Dkt. #216, p. 14. For both of these, the NYS-DEC and EPA gave explicit commands on the legal requirements for their operation, yet, Tonawanda Coke chose to ignore those commands and operate them as they saw fit. In fact, Tonawanda Coke illegally operated both Quench Tower #2 and the battery flare stack for over a decade until the violations were detected by the regulatory agencies, illustrating a regulatory attitude of "catch me if you can."[1]

In addition to the regulatory history described above, James Strickland, the Regional Engineer for NYS-DEC Region 9, has provided an affidavit to the government outlining

[1] Tonawanda Coke's decision to cap the bleeder valve and cease spreading hazardous coal tar sludge onto the coal field further supports this regulatory attitude. Although Tonawanda Coke argues that its decision to stop both of these operations was made independently and once it learned of concerns by the regulatory agencies, *see* Dkt. #229, pp. 7-8, such "decision" came after the execution of the criminal search warrant on December 17, 2009. In fact, as witnesses testified at trial, immediately following the criminal search warrant, employees were instructed to cease spreading the coal tar sludge on the coal field, and likewise, the bleeder valve was capped within a couple of months of the warrant.

significant disagreement with Tonawanda Coke's assertions that it has dealt candidly with the NYS-DEC and is committed to future environmental compliance. A copy of Mr. Strickland's affidavit is attached hereto as **Exhibit 7**. In the affidavit, Mr. Strickland touches on a number of areas, including a discussion of recent inspections at Tonawanda Coke whereby NYS-DEC staff were "discouraged by some of their observations, which again do not reflect a corporation which has learned from its mistakes and is serious about full compliance with all applicable environmental regulations." Exhibit 7, ¶ 32. For instance, not only were additional violations detected following the jury verdict, such as Tonawanda Coke's failure to perform even simple actions like operating water sprinklers to control fugitive dust, but Tonawanda Coke unilaterally decided to stop all remedial work at the listed superfund site located across the street from the facility. Mr. Strickland's affidavit also highlights that the opinion of Mr. Sandonato, a retired NYS-DEC official, regarding Tonawanda Coke as one of the cleanest coke batteries in the country, does not reflect the opinion of the NYS-DEC.[2] Finally, Mr. Strickland's affidavit makes clear that the remedial work and a majority of the facility upgrades completed by Tonawanda Coke as part of the civil matters were required by federal and/or state environmental laws. *See* Exhibit 7, ¶ 40. Therefore, it is improper for Tonawanda Coke to argue that the completed remedial work and facility upgrades illustrate a company intent on environmental compliance, as such activity was necessary to comply with the law. Viewed another way, the fact that Tonawanda Coke has allegedly made $11 million in upgrades to the facility to address some of the civil violations directly supports the government's assertion that Tonawanda Coke

[2] In fact, following Mr. Sandonato's statements referenced by Tonawanda Coke in its Memorandum, *see* Dkt. #229-1, Mr. Sandonato provided testimony under oath which gave context to his opinions, including that he had actually only been to two other coke plants in the United States, and that his inspections of Tonawanda Coke occurred in the early 1980's.

has simply followed its own regulatory agenda for the past several decades, while enjoying the economic benefit associated with delayed compliance.

II. The Entrapment by Estoppel Defense was Rejected by the Jury and Should Not be Used as a Basis to Mitigate any Potential Sentence

In an effort to present mitigating factors to the Court for use in sentencing, Tonawanda Coke and Defendant Kamholz continue to advance its entrapment by estoppel defense to the charges. As the Court is aware, the jury soundly rejected the defendants' defense of entrapment by estoppel, and there is no basis for Tonawanda Coke to continue to claim that regulatory agencies were aware of its criminal conduct. Although Tonawanda Coke would like the Court to believe "that for 20 years prior to the return of the Indictment…, the NYS-DEC inspectors were aware of, and did not object to, the Company's placement of coal tar sludge on the coal piles in the coal field," *see* Dkt. #229, p. 6, that is simply not true. There was no evidence at trial that the NYS-DEC was specifically aware that hazardous coal tar sludge was being mixed with coal on the ground, and the historical RCRA inspection reports simply stated that the K087 waste was being mixed with the coal. The reports did not say where that mixing was occurring, and there is no other evidence indicating that the RCRA inspectors were aware that such mixing was actually happening on the ground.

Likewise, although Tonawanda Coke would like this Court to believe that defendant Kamholz disclosed to RCRA inspectors in June of 2009 the exact location where he intended to mix the hazardous contents of the Barrett Tanks with the coal, NYS-DEC Inspector Corbett testified at trial that he was not provided such information. As for the

bleeder valve, it is unfortunate that Tonawanda Coke continues to make the argument that the 2003 Hazardous Air Pollutant ("HAP") Emission Inventory disclosed to NYS-DEC the location and operation of the bleeder valve. As presented at trial, the most that could be said for the HAP Inventory was that it disclosed that there was a leaking valve on the coke oven gas line. It surely did not detail the operational details of the bleeder valve, nor that 173 tons of coke oven gas was being released in a given year from the bleeder valve. Tonawanda Coke's continued argument that the HAP Inventory was sufficient notice to the NYS-DEC regarding the operation of the bleeder illustrates that Tonawanda Coke still has not accepted responsibility for the offenses and highlights its unrelenting belief that the regulatory agencies were to blame for failing to detect its criminal conduct.

The HAP Inventory is discussed in an affidavit provided to the government by Harish Patel, a lead environmental engineer with EPA Region 2, and a witness in the criminal trial. Attached hereto as **Exhibit 8** is a copy of Mr. Patel's affidavit. Mr. Patel highlights that the Clean Air Act (CAA) heavily relies on self-reporting by industry as to the sources and quantities of air emissions. Therefore, it was the duty of Tonawanda Coke, and no one else, to fully and accurately identify *all* sources of air pollution to the NYS-DEC. Mr. Patel also discusses the importance of baffles in quench towers, and refutes Tonawanda Coke's argument in its Memorandum that baffles are not effective pollution control devices. Simply put, baffles are the *only* pollution control for quenching emissions, and without them, Tonawanda Coke allowed a significant amount of particulate matter to enter the atmosphere. Throughout the case, numerous witnesses discussed how particulate matter would rain down on them while working or conducting inspections at Tonawanda Coke.

Likewise, residents living in the vicinity of Tonawanda Coke constantly had to deal with particulate matter settling on their cars and property. As an example, attached hereto as **Exhibit 9** are several complaints submitted to the NYS-DEC between the period of March 13, 2009, and August 20, 2009, all of which involve negative effects from particulate matter fallout believed to be associated with Tonawanda Coke.[3]

III. The Defendants Have Caused Environmental Harm

Throughout its Memorandum, Tonawanda Coke argues that there has been no environmental harm arising from the counts of conviction. *See* Dkt. #229, pp. 15, 23, 27-28. Tonawanda Coke is correct in arguing that prior to trial the parties stipulated that evidence of environmental harm should be excluded from the trial. *See* Dkt. #229, p. 28. However, that was simply due to the fact that environmental harm is not an element of the crimes charged. Further, Tonawanda Coke uses the premise of no environmental harm to argue that community service payments should not be included in any sentence imposed by this Court. The government strongly rejects such illogical statements. Through the defendant's actions, significant quantities of coke oven gas, a hazardous air pollutant under the CAA and known human carcinogen, were released to the ambient air. In describing coke oven gas, the EPA has noted that

> Coke oven emissions are among the most toxic of all air pollutants. Emissions from coke ovens include a mixture of polycyclic organic matter, benzene, and other chemicals that can cause cancer. Occupational exposure studies of coke oven workers have shown statistically significant excess mortality from cancers of the respiratory tract, kidney, and prostate and all cancer sites combined.

[3] These complaints have been redacted to remove the names and identifying information of the complainants. If the Court so desires, unredacted copies of these complaints can be submitted to the Court under seal.

See Fact Sheet, available at http://www.epa.gov/airtoxics/coke/cokefact.pdf (last accessed September 30, 2013).

Similarly, over the course of several decades, Tonawanda Coke directly introduced hundreds of tons of hazardous coal tar sludge per year into the environment by mixing the material directly with coal on the ground. Although the government has not identified any particular individual victims in this case,[4] the defendant's conduct directly and proximately harmed the air and ground surrounding Tonawanda Coke. *See* USSG § 3D1.2, cmt. n. 2 (explaining that for "offenses in which there are no identifiable victims," the victim is "the societal interest that is harmed"). The fact that there was some harm to the environment, through air pollution as well as soil contamination, forms the basis for the government's request for the funding of the community service projects as outlined in the government's sentencing memorandum. Moreover, the first two community service requests, the Tonawanda Health Study and the Air/Soil Testing Study, seek to quantify the level of harm inflicted on the community by the defendant's prolonged conduct of contaminating the environment. There can be no better way to "repair the harm caused by the offense," USSG § 8B1.3, than to provide the Tonawanda community and Tonawanda Coke workers with vital information regarding the potential and/or actual adverse health effects sustained due to the operations at Tonawanda Coke.[5]

[4] Pursuant to 18 U.S.C. § 3663(a)(2), a victim is "a person directly and proximately harmed" as a result of the offense.

[5] In the government's Sentencing Memorandum, letters and impact statements were attached from members of the community who believed that they have been affected by the actions of Tonawanda Coke. *See* Dkt. #216, Exhibit 46. Since the filing of that memorandum, the government has received one additional impact statement, which is attached hereto as **Exhibit 10**.

With regard to the two experts proffered by Tonawanda Coke as part of sentencing, Stephen Johnson and John Holmes, both would testify as to a lack of environmental contamination as a result of Tonawanda Coke's 14 criminal offenses. The government respectfully suggests that such expert testimony is wholly unnecessary as the Court already has all of the facts necessary to render a just sentence. In fact, the Second Circuit has specifically noted that a district court may infer environmental contamination from the evidence introduced. *United States v. Liebman*, 40 F.3d 544, 550-51 (2d Cir. 1994). Similarly, in *United States v. Ferrin*, 994 F.2d 658, 664 (9th Cir. 1993), the court stated that proof "of environmental contamination does not necessarily require a full-blown scientific study. We see no reason why in most cases reasonable inferences from available evidence concerning the offense at issue would not suffice to support a conclusion that the illegal acts resulted in contamination." The court went on to define "contaminate" as "'to soil, stain, or infect by contact or association' or 'to make ... impure by admixture.'" *Id*. (citations omitted). In the present case, the defendants' conduct most definitely contaminated the air and soil, for which contamination continued and persisted for decades. From the evidence introduced at trial, and from the massive amount of money spent to clean up the Barrett Tanks, there is no difficulty in inferring that the defendants' conduct resulted in widespread contamination, and as such, no expert testimony is necessary to address this issue. However, in the event the Court is inclined to allow Tonawanda Coke's experts to testify at a sentencing hearing, the government would likewise seek to present the Court with testimony from a few residents living in the immediate vicinity of Tonawanda Coke that felt the direct effects of Tonawanda Coke's contamination.

IV. A Remedial Investigation of the Coal Field is Appropriate

Based on the longstanding practice by Tonawanda Coke of mixing hazardous coal tar sludge directly into the coal on the ground, this Court should order Tonawanda Coke to conduct a remedial investigation to determine the nature and extent of possible contamination of the coal field, and if contamination is discovered, Tonawanda Coke should be ordered to clean up the contamination. Tonawanda Coke now argues that such a remedial order is unnecessary due to prior remediation activities undertaken as part of other civil cases with NYS-DEC and the EPA. *See* Dkt. #229, pp. 24-27. However, in making this argument, Tonawanda Coke admits that prior contamination has been noted in discrete areas when sampled, and that those sampling activities are somewhat dated. Now that the Tonawanda Coke's criminal conduct has been brought to light, a remedial investigation will allow for a full understanding of the level of contamination of the coal field. In fact, in an affidavit provided to the government by Phil Flax, RCRA Section Chief for EPA Region 2, the possibility of widespread contamination of the coal field is discussed, and a strong recommendation is made that a remedial investigation be ordered. Attached hereto as **Exhibit 11** is a copy of Mr. Flax's affidavit. As evidenced from this affidavit and the affidavit of Mr. Strickland, *see* Exhibit 7, the hazardous waste remedial actions taken by Tonawanda Coke were never truly voluntary but rather taken either pursuant to government order or under threat of government action. None of those remedial actions addressed the potential contamination caused by mixing of hazardous wastes in the coal fields, as that conduct was never brought to the government's attention until the events which were the

subject of the Indictment. As such, the government asserts that such a remedial investigation is warranted.

V. Tonawanda Coke has the Ability to Pay a Substantial Criminal Penalty

In its Memorandum, Tonawanda Coke asserts that it only has the ability to pay a $2,000,000 criminal fine, and attaches a financial report from a Certified Public Accountant (CPA) to support this amount. *See* Dkt. #229, pp. 10-12; Dkt. #229-6. It is important to note that the CPA who prepared the report has no experience rendering ability to pay assessments in federal criminal cases, and that much of the financial data and data regarding market conditions was supplied directly by Tonawanda Coke. The government has no mechanism to test the veracity of this non-public information, and Tonawanda Coke has expressly refused the government access to its current financial information.[6] Moreover, even a simple review of the CPA's report indicates that the CPA only focused on certain favorable statistics that would support his conclusion. For example, although the CPA indicates that Tonawanda Coke "sold approximately 80,000 tons of *foundry* coke in the year ended June 30, 2013, a decrease of 11.1 percent compared to the previous year," Dkt. # 229-6, p. 5, the CPA fails to note that for the corporate years ending 2010, 2011, and 2012, tonnage of *total* coke products produced by Tonawanda Coke steadily increased from 132,478, to 144,823, to 149,698 tons, respectively. *See* PSR, ¶ 111.

Based on the net income earned by Tonawanda Coke during the period ending June 30, 2005, to June 30, 2012, along with a variety of other factors, the government submits

[6] The government's motion to compel the disclosure of financial records, Dkt. #204, which has been opposed by Tonawanda Coke, Dkt. #209, remains pending.

that Tonawanda Coke's ability to pay assessment is outrageous. First, from June 30, 2005, to June 30, 2012, Tonawanda Coke earned a total profit of $59,905,990. That is a substantial amount of money earned by Tonawanda Coke, and does not indicate a company that is in financial peril and only able to pay a $2,000,000 criminal fine. Second, in 2011, the Erie Coke Corporation, also controlled by J.D. Crane, agreed to a $21 million settlement with the EPA and Pennsylvania. It should be emphasized that such settlement was the result of a *civil* case, and only involved violations of the CAA. Unlike the present situation, the regulatory agencies in the Erie Coke case had no basis to find that any Erie Coke employees engaged in obstructive behavior, or that violations of RCRA had taken place. Finally, as discussed in the government's sentencing memorandum, based on an ability to pay assessment made by Leo Mullin, an EPA cost recovery expert, the government believes Tonawanda Coke can and should pay a total financial sanction of $57,141,699. For the Court's convenience, Mr. Mullin's ability to pay assessment is attached hereto as **Exhibit 12**. In the event the Court requires additional information or testimony from Mr. Mullin, he can be available to the Court at sentencing if necessary.

CONCLUSION

For the foregoing reasons, and for the reasons previously set out in the government's Sentencing Memorandum, the government respectfully recommends that Defendant Tonawanda Coke be sentenced as follows: (1) payment of a $44,347,517 criminal fine, (2) payment of $12,794,182 in community service projects, (3) payment of a $5,600 special assessment, (4) imposition of a 5-year term of probation, (5) conduct a remedial investigation of the coal field, and remediate if necessary, and (6) implementation of an Environmental Compliance Plan.

DATED: Buffalo, New York, September 30, 2013.

Respectfully submitted,

WILLIAM J. HOCHUL, JR.
United States Attorney

S/ AARON J. MANGO

BY: _____

AARON J. MANGO
Assistant U.S. Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202
(716) 843-5882
aaron.mango@usdoj.gov

ROCKY PIAGGIONE
Senior Counsel
United States Department of Justice
Environmental Crimes Section
601 D Street, NW
Washington, DC 20004
(202) 305-4682
rocky.piaggione@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANT TONAWANDA COKE'S SENTENCING MEMORANDUM with the Clerk of the District Court using its CM-ECF system, which would then electronically notify the following CM/ECF participants on this case:

Rodney O. Personius, Esq.

Gregory F. Linsin, Esq.

Jeanne M. Grasso, Esq.

Ariel S. Glasner, Esq.

John J. Molloy, Esq.

I further certify that I provided a copy of the foregoing via inter office mail to the following participant on this case:

United States Probation Department
Attn: Susan C. Murray, USPO

S/ AARON J. MANGO

AARON J. MANGO